Editor's note: appeal filed sub nom. Mary Akootchook v. United States, Civ. No. A98-0126 (D. Alaska April 22, 1998); dismissed, (claims barred by res judicata effect of two class actions) (Nov. 2, 1999); relief from judgment denied, (Feb. 1, 2000); appeal filed, No. 00-35325 (9th Cir. April 3, 2000), aff'd (Nov. 8, 2001), 271 F.3d 1160.

UNITED STATES
v.
DANIEL AKOOTCHOOK
GEORGE AKOOTCHOOK

IBLA 91-192, 91-219 Decided July 5, 1994

Appeals from decisions of Administrative Law Judge Ramon M. Child, approving Native allotment claims F-16623 and F-18779.

Reversed.

1. Alaska: Native Allotments

Native allotment applicants failed to establish qualifying use and occupancy of their claims was independently initiated by offering evidence that, before withdrawal of the land claimed by them from appropriation, they had used and occupied it while they were minor children in the company of and under the supervision of their parents.

APPEARANCES: Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for appellant, Bureau of Land Management; Elizabeth M. Bruch, Esq., Alaska Legal Services Corporation, Barrow, Alaska, for Daniel Akootchook and George Akootchook, appellees.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Bureau of Land Management (BLM) has appealed from two February 6, 1991, decisions of Administrative Law Judge Ramon M. Child that approved Native allotment applications of Daniel Akootchook, F-16623, and George Akootchook, F-18779.

On December 22, 1970, Daniel Akootchook filed Native allotment application F-16223 for Parcels A and B pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed but with a savings clause, 43 U.S.C. § 1617(a) (1988). By memorandum dated March 16, 1973, the Bureau of Indian Affairs, notified BLM that Parcels C and D had been omitted from the application. Those parcels were treated as timely filed (Tr. 21-22, Exh. D-2). On February 5, 1974, Daniel filed a with

drawal of Parcel B. Each of his three remaining parcels was for approximately 40 acres. Parcel A is located within sec. 24, T. 8 N., R. 31 E., at Camden Bay; Parcel C is within sec. 23, T. 1 S., R. 29 E., at Lake Peters; and Parcel D is in secs. 30 and 31, T. 2 N., R. 32 E., near the Hulahula River, Umiat Meridian, Alaska. Daniel claimed use and occupancy of these parcels for hunting and fishing from November 1941 (Exh. D-1).

On December 23, 1970, George Akootchook filed Native allotment application F-18779 for three parcels separate from the claims made by his brother Daniel, but also identified as A, B, and C. George's Parcel A consisted of 40 acres in sec. 27, T. 7 N., R. 35 E., on the Jago River near Ninguanak. His Parcel B was for 40 acres in secs. 10 and 11, T. 2 N., R. 30 E., at the fork of Kekiktuk and Sadlerochit Rivers, and his Parcel C was for 80 acres located in secs. 26 and 27, T. 8 N., R. 26 E., on a lake near the Tamayariak and Canning Rivers, Umiat Meridian, Alaska. George claimed use and occupancy of these parcels for hunting and fishing since 1942 (Exh. G-1).

On May 17, 1989, BLM sought to invalidate both Native allotment claims, contending the Akootchooks had not established independent use and occupancy of the land prior to a 1943 withdrawal of the land. Because it was withdrawn from entry under the public land laws in 1943, the land was not unreserved on December 13, 1968, and neither application was legislatively approved pursuant to section 905(a)(1) of Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1988). Therefore, both applications were required to be adjudicated pursuant to the Act of May 17, 1906, as amended, and its implementing regulations. In his decisions, issued separately, Judge Child found that George had commenced independent use and occupancy of his claimed parcels prior to the effective date of the 1943 withdrawal and approved George's application for all three parcels claimed by him. Judge Child found that Daniel had commenced independent use and occupancy of his Parcels A and D prior to the effective date of the 1943 withdrawal and approved his application for those parcels, but found that independent use of his Parcel C had not been shown and therefore denied approval of that tract, leaving only Parcels A and D at issue on appeal in Daniel's case since Daniel did not appeal the rejection of his Parcel C.

These appeals share a common question: whether there was qualifying independent use and occupancy of lands now located inside the Arctic National Wildlife Refuge prior to withdrawal of that land from appropriation in 1943. Because of that common issue and inasmuch as the facts of each case are closely related and were developed at a consolidated hearing, these appeals are consolidated for economy of decision; each claim is, however, separately considered. There is no dispute that the land sought by both claimants was "withdrawn from * * * entry under the public-land laws of the United States" on January 22, 1943, by Public Land Order No. (PLO) 82 (8 FR 1599 (Feb. 4, 1943)), and remained withdrawn from such appropriation at all times after that date. Under the Act of May 17, 1906, as

amended, a Native allotment applicant is entitled to up to 160 acres of "vacant, unappropriated, and unreserved" land upon satisfactory proof of "substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. §§ 270-1 and 270-2 (1970). To be valid, any claim of such use and occupancy must therefore have been initiated before the January 22, 1943, withdrawal. See Andrew Gordon McKinley (On Reconsideration), 61 IBLA 282, 285 (1982).

The use and occupancy must also be "substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use." 43 CFR 2561.0-5(a). To qualify, the land must be used and occupied by the applicant as an independent citizen acting on his own behalf or as head of a family, and not as a minor child in the company of and under the supervision of his parents. See Akootchook v. United States at 747 F.2d 1319; United States v. Bennett, 92 IBLA 174, 176-77 (1986), and cases cited. The only issue presented to Judge Child in these cases was whether independent use and occupancy was initiated by either claimant prior to withdrawal of the land on January 22, 1943. 1/ After reviewing the evidence, Judge Child concluded that neither George nor Daniel had demonstrated use and occupancy of his land as an independent citizen prior to that date. He based this conclusion on his determination that each claimant was on the land claimed as a minor member of the same family and was engaged in berry picking, trapping, and fishing prior to the withdrawal of the land. Judge Child determined that in their society each member of the Akootchook family was co-dependent on the others, with each family member contributing to the family survival by way of subsistence on the land according to his or her ability. He nonetheless concluded that in such a society no family member could be viewed as totally independent and,

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1/ We reject arguments made by BLM, citing Akootchook v. United States, 747 F.2d 1316 (9th Cir. 1984), cert. denied, 471 U.S. 1116 (1985), that both these appeals are barred by the doctrine of res judicata. In Akootchook the court found that Alaska Natives could not rely on ancestral use in order to perfect Native claims; the issues presented by these instant appeals (whether there was individual use by each of these claimants of the land sought by him) were not before the court and were not decided by the Akootchook decision. These appeals are not, therefore, barred by the prior decision involving a different issue concerning these same individuals. See generally Harris v. Jacobs, 621 F.2d 341, 344 (9th Cir. 1980). The hearing that gave rise to these appeals was conducted subsequent to the Akootchook decision in conformity to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), that required fact-finding in a Native allotment case when there is an issue of fact whether an application should be denied. The question whether these individual claims were validated by independent individual use prior to withdrawal was first considered at the hearing held by Judge Child on June 7, 1990; these appeals are therefore now properly before us for decision of that disputed issue. See Scott Burnham, 100 IBLA 94, 131-33, aff'd, American Colloid Co. v. Hodel, No. C88-224-K (D. Wyo. 1988).

from that perspective, the use each made of the land in allotment claims F-16623 and F-18779, prior to the withdrawal, was as an independent citizen for himself and his family.

On appeal BLM argues that these findings were made in error because each claimant failed to show that his qualifying use of the land commenced
before withdrawal on January 22, 1943. BLM contends that while each of them may have travelled to the lands he claimed before 1943 (when they would have been no older than 9 and 10 years of age), they were taken there and were kept on the land under the care and direction of other family members, performing only those tasks that children might do under the direction of their elders. BLM also contends, concerning George's claim to his Parcel C, that he did not use it until he was 30, long after the land was withdrawn.

Daniel Akootchook, the younger claimant, was born on February 7, 1933 (Tr. 173, Exh. D-10), and was not quite 10 years old when the land he claimed was withdrawn by PLO 82. He claimed to have used the land prior to 1943. The evidence shows that prior to 1943 he was always in the company of a parent, an older sibling, or his aunt, and was under their supervision. The Akootchooks were an Inupiat Eskimo family who in 1943 had a subsistence lifestyle. Daniel testified that when he was 9 or 10 he started following along on hunting trips. On these trips he was told that if he wanted to learn, then he had chores to do, which were to gather wood and make hot water for tea or coffee. He was not allowed to follow his older brother after big game (Tr. 175, 176). He picked berries when he was 9. When the others picked berries he followed them. He was told not to eat the berries but to save them (Tr. 176). He also testified that he was 9 when he started helping gather firewood or fuel (Tr. 176). While his older brothers chopped the wood, he brought it inside. When the older ones chopped ice, he brought it to his mother. He did the jobs his father told him to do (Tr. 177).

Daniel testified that he did not know when he first went to Parcel A with his family (Tr. 179). He first went to Parcel D in 1942 when he was 9 years old. He went with his family but he did not help them hunt; instead he helped his aunt gather wood (Tr. 184). He testified that when the family went hunting he would be with the young people and his mother with his bow and arrow while his older brothers pulled the sled, helping the dogs (Tr. 186). He first began hunting with a bow and arrow when he was 9, 10, or 11 (Tr. 187). On May 28, 1986, Daniel gave an affidavit in support of his Native Allotment claim (Exh. D-10). In this affidavit, he stated that he started using Parcel A when he was young but gave no age or dates. He stated that "we [his family] would go" there. He went to this land by himself when he was old enough to hunt alone but no date or age is given. As to Parcel D, the affidavit says he went there to hunt caribou with his brother when he was 9 years old.

George Akootchook was born on February 22, 1932 (Tr. 15, 60, 109, Exh. G-10 at 2), and was not quite 11 years old when the land he claimed was withdrawn by PLO 82. He claimed to have used the land before 1943.

The evidence shows that prior to 1943 he was always in the company of a parent, an older sibling or his aunt and was under their supervision. George helped when he was old enough or big enough to help. He testified that he started helping pick berries when he was 6 or 7 and started helping gather firewood as fuel when he was young (Tr. 113). When he was 8 or 9 he went hunting with his father, who taught him how to work. His job on these trips was to gather wood and hold the camp together (Tr. 114). George killed his first caribou and his first seal with a .22 when he was 9 or 10 and hunted ptarmigan and squirrel before he was 10 (Tr. 116-17). He fished with a net when he was 6 or 7 years old (Tr. 120-21). He testified that he started using his Parcel A when he was 8 or 10 years old (Tr. 121). His aunt, Jane Kilapsuk, took him traveling, camping, and trapping squirrels. The reason his aunt did so was to teach him about hunting and trapping (Tr. 136). He didn't start using Parcel A by himself until he was 13 or 14 years old, when he was first able to hook up a dog team and travel (Tr. 123, Answer at 7). George testified that he did not recall how old he was when he first went to his Parcel B, but that he was not old enough to do anything, that he would go there when the men went hunting (Tr. 127). He also stated that he went there when he was taken and that travel to Parcel B was by dog team (Tr. 134). Concerning Parcel B, George testified that he "got his land" when he was about 30 and discovered how good the fishing was but did not know how old he was when he first went there (Tr. 129, 130). His family used Parcel C before 1943 (Tr. 134), but George did not testify that he used the land prior to 1943.

On May 19, 1980, George gave an affidavit in support of his Native Allotment claim (Exh. G-10). On May 28, 1986, he signed a declaration reaffirming the affidavit (Exh. G-9 at 2). In his affidavit, he stated that he started using Parcel A when he was a little boy to hunt ptarmigan and squirrels. He first went with his older brothers and sisters, but it was not until he was 16 that he began hunting there alone. In regard to Parcel B, he first traveled there about 1940 with his parents and his aunt Jane Kilapsuk. They travelled by dog team looking for wolves. He stated that many members of his family used the parcel before he first went there, including his brother Isaac who herded reindeer in that area before 1948. The affidavit does not state when he first went there alone; it recites that the Inupiat people had long used the land in Parcel C and that there was an old sod house on the land that his parents did not build. His parents used the land together after they married and his family has continued to use it. As to his own use of Parcel C, a handwritten change to the affidavit states that George used the land "since about 1948" (Tr. 86-87).

Isaac Akootchook, an older brother of Daniel and George, testified on their behalf. He testified that Daniel would have been 6, 7, or 8 when he started helping pick berries on Daniel's Parcel A (Tr. 145). As to Daniel's Parcel D, Isaac testified the family went there before Daniel was born, and that Daniel first went there when he was 3 or 4 (Tr. 147). An affidavit in the file from Isaac dated December 10, 1987 (Exh. D-11), states that Isaac and his brothers went caribou hunting in Daniel's Parcel A starting in the 1930's and 1940's. Daniel went with them, but it was not stated

at what age he began to do so. As to Parcel D, Isaac stated that he herded reindeer there in the 1930's and that Daniel went ptarmigan and sheep hunting there before Isaac married in 1944.

Isaac also testified he was 11 years older than George and that George started hunting on George's Parcel A when he was 10 or 11 years of age and that he started helping pick berries at 5 or 6. As to George's Parcels B and C, Isaac testified the family went there before George was born and George started using them when he was 10 or 11 (Tr. 143, 144). George went with the others on hunting trips, helping pack the supplies in and perform camp chores such as gathering wood and water and helping skin caribou (Tr. 143). In an affidavit dated December 10, 1987, Isaac stated that the family herded reindeer in the area until they lost the herd about 1937 but that the family, including their aunt, Jane Kilapsuk, continued to go to Parcel B to hunt squirrel and caribou and that George went hunting there from a young age (Exh. G-12).

The record includes a copy of an affidavit from Herman Rexford, dated December 11, 1987 (Exh. D-12). Rexford, who was married to an older sister of George and Daniel, stated that he moved to Kaktovik in 1941, when he began hunting with the Akootchooks. They hunted Daniel's Parcel A in the spring and summer and Daniel began hunting with then at a young age. The Rexford affidavit identified Daniel's Parcel D as a favorite base camp from which they hunted caribou and sheep in the mountains. Concerning George's claim, Rexford also supplied an affidavit reciting that George had hunted with him ever since Rexford moved to Kaktovik and that George's Parcel A was used for a base camp to hunt sheep and caribou, as was Parcel B. Rexford stated that they hunted on George's Parcel C in summer for caribou, geese and ducks, and fished there with gill nets (Exh. G-11).

[1] The requirement that there be independent use by a Native claimant if he is to qualify for an allotment derives from Departmental regulation 43 CFR 2561.0-5(a), requiring that there be "substantial actual possession and use of the land, at least potentially exclusive of others." A Native claiming land to the potential exclusion of others should be able to lay claim to the land to the exclusion of all others; the regulation makes no distinction between family members and strangers. See United States v. Bennett, 92 IBLA at 177. There being no regulatory distinction between strangers and family members, the potential ability to exclude others must extend to other family members. Id.

In order to approve allotment claims F-16623 and F-18779, Judge Child concluded that no member of the Akootchook family could be viewed as totally independent. Having made this finding (which if it were correct required that he reject both claims for want of independent use by either Daniel or George), he concluded in error that the claims were valid for the very reason that disqualified them under Departmental regulation, finding in each case that "Akootchook's use of the land [claimed] prior to the withdrawal was as an independent citizen for himself and for his family"

(Decision F-16623 at 8; Decision F-18779 at 9). This finding was not supported by the record and is contrary to established Departmental decisions and policy.

When 43 CFR 2561.0-5(a) (formerly 43 CFR 2212.9-1(c)(1)) was promulgated in 1965 (see 30 FR 3710 (Mar. 20, 1965)), the Department adopted an interpretation requiring substantial actual possession and use to the potential exclusion of others, in conformity to Departmental policy as explained in Allotment of Land to Alaska Natives, 71 I.D. 340, 358 (1964). It is clear that independent use can generally be made by an adult member of a family when in the company of minor children, without proof to the contrary; the converse of this proposition, however, is not true, for a minor child cannot generally engage in independent use of the land when in the company of and under the supervision of his parents. When there is proof that a minor child acted independently as shown by his activity in relation to his parents and others, the regulatory requirement of "substantial actual possession and use of the land, at least potentially exclusive of others" can be satisfied by a minor child. See William Bouwens, 46 IBLA 366, 370-71 (1980). No such showing has been made by Daniel or George Akootchook on the record now before us, however.

Each claimant contends that he used the land as an independent citizen for himself and his family; nonetheless, the recorded evidence shows otherwise. The evidence offered by Daniel and George shows that, while each claimant might have been present on the land he claimed before it was withdrawn, he was not acting independently. It is clear from the record that prior to 1943 each of these claimants went where he was taken by his elders and did what he was told under family supervision. Such activity does not show actual possession and use to the potential exclusion of others.

While it is clear that George Akootchook has used the land in all three parcels claimed by him since the withdrawals and others now recognize his use of the land as if it were his own, his independent use of it began sometime after the withdrawal of the land on January 22, 1943. In the case of Daniel Akootchook also, while it is apparent that he has used the land at issue since the withdrawal in 1943, he has not shown independent use of it before that time. An applicant acquires no rights against the United States capable of defeating withdrawal until he has initiated qualifying use and occupancy under the statute. If it can be shown that the rights he claims were properly initiated prior to withdrawal the applicant can perfect his application by continued qualified use and occupancy for the required 5-year period, with the remainder of the period of use and occupancy being completed after the withdrawal. See United States v. Bennett, 92 IBLA at 175. If, however, qualifying use and occupancy was not initiated before withdrawal, the withdrawal will attach. Thereafter, use and occupancy cannot be initiated, and an applicant can gain no rights. See Akootchook v. U.S. Department of the Interior, 747 F.2d at 1320; Heirs of Doreen Itta, 97 IBLA 261, 266 (1987). It is concluded that qualifying use and occupancy by Daniel and George Akootchook began after the 1943 withdrawal and therefore they gained no rights to the land claimed by them.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Child's decisions approving the allotment applications of Daniel Akootchook and George Akootchook are reversed and Native allotment applications F-16623 and F-18779 are rejected.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge